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No. 04-1043

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE REPUBLIC OF CONGO, CMS NOMECO CONGO INC., THE NUEVO CONGO COMPANY, AND NUEVO CONGO LTD.,

Petitioners,

v.

AF-CAP, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY TO BRIEFS IN OPPOSITION

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RULE 29.6 STATEMENT

Petitioners' corporate disclosure statement is at page ii of the Petition for a Writ of Certiorari.

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Petitioners submit this Reply to the Brief of Respondent Af-Cap, Inc. in Opposition ("Opp.") to Petition for a Writ of Certiorari ("Pet.") and to Respondent's Supplemental Brief.

1. The Decision Below Directly Raises The "Situs" Issue Which This Court Should Resolve

Respondent Af-Cap, Inc. ("Af-Cap"), asserts that Petitioners' Question Presented is not "present in this case" because "[t]he Fifth Circuit did not address" and "did not have to" address "the location of the Congo's natural resources," as the property at issue is intangible, not the oil itself physically located in the Congo. Opp. at 5. This is wrong. The Question Presented clearly identifies the property at issue as the Congo's "right to receive" its royalty share of oil in Congolese territory, to which the Fifth Circuit erroneously ascribed a situs "in the United States" for purposes of § 1610(a) of the FSIA.[1]

Af-Cap's argument that the relevant property is "the garnishees' debt obligation" and not "Congo's oil or Congo's ownership interest in that oil," Opp. at 6, attempts to obscure the ineluctable fact that the Congo's royalty rights and the Garnishees' royalty obligations are the same "prop-

[1] Af-Cap's question "whether this case is ripe for review," Opp. at 5 n.3, is unwarranted. If this Court reverses, the district court's final judgment dismissing the case will be reinstated. This Court commonly reviews cases in this procedural posture, particularly ones decided under the FSIA. *See, e.g., Republic of Austria v. Altmann*, 541 U.S. 677 (2004); *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003); *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993); *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611 (1983). This Court need not await further proceedings on the merits below because whether the Congo's property is "in the United States" under § 1610(a) was recognized by the Fifth Circuit to be a threshold question of law. Petition Appendix ("Pet. App.") 89a, which is ready now for review by this Court. If the property is not "in the United States" the case can proceed no further.

erty." The Fifth Circuit had to determine the situs of the Congo's intangible property to decide whether it is "property in the United States" under § 1610(a) of the FSIA. This Petition seeks review of the Fifth Circuit's erroneous resolution of that question.

This federal law question raised in the Petition implicates crucial foreign relations interests of the United States. The Fifth Circuit's decision harms U.S. foreign policy objectives with respect to direct investment by U.S. businesses in developing countries through "cooperative relationships that create the right economic and political incentives,"[2] particularly in the energy sector. *See* Pet. at 25-26. The Fifth Circuit's decision creates incentives to exclude U.S. businesses from these "cooperative relationships," undermining foreign policy objectives. The Solicitor General recently expressed analogous concerns regarding what it and this Court viewed as an interpretation of the Foreign Trade Antitrust Improvements Act that applied the statute extraterritorially,[3] creating disincentives to international cooperation with the United States and harming foreign policy interests.[4]

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[2] Overseas Private Investment Corporation, *Private Sector Investment in Development* 2 (July 31, 2004), http://www.opic.gov/Mission/AspenAug08.doc.

[3] *See* Brief for the United States as Amicus Curiae Supporting Petitioners, *F. Hoffmann-LaRoche Ltd. v. Empagran, S.A.*, No. 03-724, 2004 WL 234125, at **29-30 (Sup. Ct. Feb. 3, 2004).

[4] Af-Cap's assertion that its claim was held by the United States government is misleading. *See* Opp. at 13 n.5. In 2002, the FDIC (not the Resolution Trust Corporation) closed the Connecticut Bank of Commerce ("CBC"), the previous named plaintiff in this action, and, as receiver, reassigned the claim to Af-Cap. Af-Cap has always been the beneficial owner of the claim it purchased in 1996, but retained CBC as its debt manager to bring this litigation on its behalf and appear to be a U.S. commercial bank rather than an offshore shell company.

2. The Decision Below Cannot Be Reconciled With *Amerada Hess* And *F. Hoffmann-LaRoche*

Af-Cap's attempts to reconcile the decision below with *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989), are unavailing. Af-Cap fails to refute the relevance of *Amerada Hess's* construction of the term "in the United States"—meaning "within the territorial jurisdiction of the United States"—to the situs of the Congo's intangible rights in its natural resources and ignores the Court's reasoning altogether. In *Amerada Hess*, in construing § 1605(a)(5) of the FSIA, the Court "appl[ied] 'the canon of construction which teaches that legislation of Congress, unless contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'" 488 U.S. at 440. Section 1605(a)(2) provides an immunity exception for suit based on certain activity "outside the territory of the United States." No such language is used in § 1605(a)(5), which only refers to torts "in the United States." The Court therefore concluded that "Congress' decision to use explicit [extraterritorial] language in § 1605(a)(2), and not to do so in § 1605(a)(5), indicates that the exception in § 1605(a)(5) covers only torts occurring within the territorial jurisdiction of the United States." *Id.* The Court reasoned that if Congress had intended § 1605(a)(5) to apply "outside the territory of the United States," it would have provided for this explicitly, as it did in § 1605(a)(2).

Indeed, the third clause of § 1605(a)(2) is the **only** immunity exception that refers to actions or property "'outside the territory of the United States.'" *See id.* at 441 (citing 28 U.S.C. § 1605(a)(2)). By contrast, the provision at issue here, § 1610(a), contains the term "in the United States" twice, applying only to a foreign state's "property in the United States," and excepting from immunity only that portion of such property that is "used for a commercial activity in the United States." 28 U.S.C. § 1610(a).

The Fifth Circuit's decision disregarded this limitation imposed by *Amerada Hess* by extending the term "in the United States" to permit attachment of the Congo's right to property within the Congo's exclusive territorial jurisdiction and control.[5] *See* Pet. at 13-15.

Nor can Af-Cap reconcile the conflict with this Court's longstanding rule, exemplified by *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004), that to avoid "unreasonable interference with the sovereign authority of other nations," "'an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.'" *Id.* at 2366 (quoting *Murray v. Schooner Charming Betsy*, 6 U.S. 64 (1804)).

Af-Cap tries to obscure the international law violations engendered by the Fifth Circuit's decision by claiming that this case is merely a "commercial dispute" that does not implicate the Congo's sovereignty. Opp. at 12. But this action is not a dispute about the Congo's commercial debt under the 1984 loan agreement with Af-Cap's predecessor-in-interest. The question is whether § 1610(a) permits Af-Cap to execute its judgment on that debt against the Congo's sovereign right to collect its royalty share of oil in Congolese territory. The Congo's sovereignty is directly implicated: there is "no doubt" that the Congo's "issuance of a license permitting the removal of [its mineral resources] . . . is a sovereign act" and its royalty rights under the concession and Congolese law are "'goods in which only the sovereign may deal.'" *World Wide Minerals, Ltd. v. Republic of Kazakhstan*, 296 F.3d 1154, 1165 (D.C. Cir. 2002) (citation omitted); *Rush-Presbyterian-St. Luke's Med. Ctr. v. Hellenic Republic*, 877 F.2d 574, 578 (7th Cir. 1989) ("a con-

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[5] 4 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 511-12, 513, 516 §§ C(1), C(1)(g), C(6) (Rudolf Bernhardt ed., 2000).

tract whereby a foreign state grants a private party a license to exploit the state's natural resources is *not* a commercial activity.") (emphasis in original). The Fifth Circuit's construction of the FSIA appropriates the Congo's rights to exploit its natural resources in violation of international law, and is thus irreconcilable with this Court's decision in *F. Hoffmann-LaRoche*.

3. The Decision Below Conflicts With The Decisions Of This Court And Other Circuit Courts

Af-Cap defends the Fifth Circuit's adoption of an inapposite state law rule for determining the situs of the Congo's property by contending that the court "correctly found that federal law, Texas law, and common law were all in accord" and that the situs rule is always "the same—the *situs* of a debt, for execution purposes, is the location of the debtor or garnishee, as the case may be." Opp. at 1, 6.[6] This is incorrect: the Fifth Circuit relied for its situs determination on a rule from Texas, Montana and New York state garnishment law, and saw no need for a different rule under the FSIA. Pet. App. 19a-21a. It thereby disregarded the body of case law establishing the substantive federal standard to be used when it is necessary to determine the situs of property as between the United States and another country. *See* Pet. at 20-21 (citing case law).

Af-Cap's contention that this Court's prior "federal law" decisions in *Harris v. Balk*, 198 U.S. 215 (1905) and *Chicago, Rock Island & Pacific Railway v. Sturm*, 174 U.S. 710 (1899), support the result below is also incorrect. The hold-

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[6] Af-Cap asserts that "The Fifth Circuit's decision involved no questions of law that were decided adversely to Petitioners, but rather questions of fact." Opp. at 2. This is clearly wrong: the Fifth Circuit held that "[b]ecause we find no clear error in the district court's material factual findings, the question before this court is **a strictly legal one**," and "the question of situs, . . . is one of law based on a fully developed record in which there are no material factual disputes." Pet. App. 11a, 16a n.12 (emphasis added).

ing in *Harris* was expressly contingent on factors that are not present in this case, namely, that the obligee could sue the garnishees in any U.S. state where they are found to enforce their obligations (which the Congo could not do) and that each jurisdiction implicated in *Harris* was within the United States and bound by the full faith and credit clause of the U.S. Constitution (which does not reach the shores of the Congo). *Sturm* is no different from *Harris*, and inapposite for the same reasons. Af-Cap does not address the factors distinguishing this case from *Harris* and *Sturm*, nor the subsequent decisions of this Court that a state law rule placing the situs of intangible property in that state if the obligor can be found there does not apply where national foreign relations are implicated. *See United States v. Belmont*, 301 U.S. 324, 327, 331 (1937) (New York rule ascribing a New York situs to receivables from banks in New York cannot be applied if it interferes with the United States's compact with a foreign government); *United States v. Pink*, 315 U.S. 203, 231-32, 232 n.9 (1942) (same).

Equally flawed is Af-Cap's attempt to distinguish federal appellate decisions addressing the same legal question that is raised in this case—whether intangible property was "in the United States" or in a foreign state—on the ground that they do so for purposes of determining the applicability of the act of state doctrine rather than for applying § 1610(a) of the FSIA.[7] *See* Opp. at 8. Af-Cap ignores that this Court and others have routinely looked to act of state doctrine cases for guidance as to issues of foreign sovereign immunity (and vice versa). *See, e.g.*,

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[7] *See F. & H.R. Farman-Farmaian Consulting Eng'rs Firm v. Harza Eng'g Co.*, 882 F.2d 281, 286-87 (7th Cir. 1989) (Posner, J.); *Tabacalera Severiano Jorge, S.A. v. Standard Cigar Co.*, 392 F.2d 706, 715 (5th Cir. 1968); *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F.2d 1333, 1334, 1338 (9th Cir. 1985) and *Braka v. Bancomer, S.N.C.*, 762 F.2d 222, 224-25 (2d Cir. 1985).

First Nat'l City Bank v. Banco Nacional de Cuba, 406 U.S. 759, 762 (1972) ("the policy considerations" underlying "the general principle of sovereign immunity. . . . are in large part also the underpinnings of the act of state doctrine" in that both "effectuate general notions of comity among nations and among the respective branches of the Federal Government"); *First Nat'l City Bank v. Banco Para el Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611, 623 n.11 (1983) (relying on act of state doctrine rationale of *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425 (1964) for preclusion of state laws to interpret the FSIA); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 706 n.18 (1976) (notwithstanding differences between act of state doctrine and foreign sovereign immunity, "it cannot be gainsaid, however, that the proper application of each involves a balancing of the injury to our foreign policy . . . through judicial affronts to sovereign powers."). Af-Cap essentially concedes that if the Congo expropriated a party's right to oil in the Congo's territory, the property's situs would be the Congo, but cannot explain why the Congo's right to oil in the Congo should have a different situs under the FSIA. Because the situs is informed by the underlying foreign relations considerations necessitating the inquiry, *see* Pet. at 20, the standards applied for act of state doctrine purposes should not differ from those used to construe § 1610(a) of the FSIA.[8]

Af-Cap's further contention, that the situs determinations in act of state doctrine cases consider only "the asset side" and not the "debt side," is also meritless. A garnishee's obligation is, by definition, the obligee's asset: they are two sides of the same

[8] Af-Cap incorrectly attributes to Petitioners "a backdoor assertion that the act of state doctrine should govern." Opp. at 11. What Petitioners argued below and in the Petition is that in construing § 1610(a) of the FSIA, the court should apply the substantive federal law standards developed to determine situs of property and obligations in act of state doctrine cases.

coin. Each of the cases Af-Cap cited in fact discusses the intangible property as a "debt," and none suggests a distinction between the "asset side" and the "debt side." *See Farman-Farmaian*, 882 F.2d at 286; *Tabacalera*, 392 F. 2d at 714-16; *Tchacosh Co. v. Rockwell Int'l Corp.*, 766 F. 2d at 1137-38; and *Braka v. Bancomer, S.N.C.*, 762 F. 2d at 224. Rather, in each case the debt's situs depends on the foreign state's ability to execute the debt against property located within its territorial dominion (as the Congo has with regard to Garnishees' royalty oil obligations).

For this reason, Af-Cap's claim that Petitioners' argument would "repeal by implication § 1610" is completely unfounded. *See* Opp. at 13. Petitioners have never argued that a debt's situs is always at the location of the creditor. Instead, Petitioners advocate the application of the established federal law standard under which the situs of the debt is in the foreign state if the foreign state has control over the debt by virtue of its control over property located within its territorial dominion.[9] A bank account in the United States, or a letter of credit issued by a U.S. bank and payable to a foreign state at its bank account in the United States, would be intangible property in the United States under § 1610(a), notwithstanding the foreign location of the payee or owner of the account.

Thus, Af-Cap "cannot gain 'additional' rights merely by characterizing the same [intangible property] as a 'debt' rather than as an 'asset,'" and thereby "avoid an analysis of the location of [the property] **under the principles of sovereign immunity**." *Fid. Partners, Inc. v. Philippine Exp. & Foreign Loan Guarantee Corp.*, 921 F. Supp. 1113, 1118 (S.D.N.Y. 1996) (emphasis added). The FSIA's provisions must "necessarily

[9] *Menendez v. Saks & Co.*, 485 F.2d 1355, 1364 (2d Cir. 1973), cited by Af-Cap further demonstrates the correct federal rule: it was not the location of the debtor that determined the debt's situs, but which jurisdiction "ha[d] the power to enforce or collect it." *Id.*

[be] informed both by international law principles and by articulated congressional policies" in enacting the FSIA. *Bancec*, 462 U.S. at 623. Garnishment is merely a procedural mechanism for the "attachment" of property that must yield to the federal policies of the FSIA. Domestic garnishment principles cannot inform the interpretation of the term "in the United States" in § 1610(a).

4. Petitioners Do Not Lack "Standing"

Af-Cap argues that Petitioners lack "standing" to petition for review because the 1984 loan agreement contains not only a waiver of the Congo's immunity, but also an agreement not to assert immunity that supposedly abrogates the mandatory provisions of the FSIA. *See* Opp. at 14-15. Every court to which Af-Cap has made this argument has rejected it because it contradicts that statute's plain text. Under the FSIA, attachment of a foreign state's property requires a court order that finds that the foreign state's property is "in the United States" and "used for a commercial activity in the United States," even where the foreign state has waived its immunity. 28 U.S.C. §§ 1610(a)(1), 1610(c).

Moreover, Af-Cap unsuccessfully made this argument to the district court in seeking to execute its money judgment against the Embassy of the Congo to the United States. *Af-Cap, Inc. v. Republic of Congo*, 326 F. Supp. 2d. 128, 129-30 (D.D.C. 2004). Af-Cap dismissed its appeal from the judgment, which held that the FSIA did not permit Af-Cap to attach the Embassy notwithstanding the provisions of the 1984 loan agreement, and Af-Cap is collaterally estopped from re-litigating this argument here.[10]

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[10] The oil company Petitioners are not collaterally estopped from litigating the legal question in this Petition. *See* Opp. at 15-16. The prior *NUFI* litigation involved a situation in which the Congo chose to pay a particular judgment with the proceeds of royalty receivables. The case did not present

5. Af-Cap's Supplemental Brief Further Shows Why Certiorari Should Be Granted

Af-Cap's Supplemental Brief merely illustrates the extent and gravity of the Fifth Circuit's errors. Af-Cap argues the Petition should be dismissed or denied because of the Congo's violation of an order of the district court, which directed officials of the Congolese government to execute documents that "turn over" the Congo's royalty rights to Af-Cap, on the theory that the Fifth Circuit's ruling gave the district court control over the Congo's sovereign rights to its royalty share of oil in Congolese territory.[11] This order—which purports to reach into the Congo to divest rights to natural resources located there from a friendly foreign sovereign that owns and controls the oil—dramatically highlights the serious consequences already resulting from the Fifth Circuit's erroneous ruling that the situs of the Congo's royalty rights is "in the United States."

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

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the question of whether a court had the authority, over the Congo's objection, to interfere with the Congo's right to receive royalty oil in its own territory.

[11] The "fugitive disentitlement doctrine," under which Af-Cap argues the Petition should be dismissed, has no application here because the Congo has not been convicted of a criminal offense and then "fled." Likewise, the cases on which Af-Cap relies for this argument are clearly inapposite: *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954) involved an appeal from a conviction for criminal contempt, and *United States v. Crawford Enterprises, Inc.*, 643 F. Supp. 370 (S.D. Tex. 1986) involved a court's threat to dismiss a suit, which was voluntarily brought in a U.S. court by a foreign state-owned oil company, for violating procedural rules.

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